Court of Appeals, State of Michigan

ORDER

Augustine Badalamento v Duane Blonde

Docket No. 250512

LC No. 03-000591-AV

Kirsten Frank Kelly
Presiding Judge

David H. Sawyer

Kurtis T. Wilder
Judges

The Court orders that the motion for reconsideration is GRANTED, this Court's opinion issued April 28, 2005, is hereby VACATED, and the appeal is DISMISSED as moot.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 28 2005
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

AUGUSTINE BADALAMENTO, Plaintiff-Appellee,	UNPUBLISHED April 28, 2005
v	No. 250512 Macomb Circuit Court
DUANE BLONDE, Defendant-Appellant.	LC No. 03-000591-AV

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a circuit court order affirming a district court judgment in favor of plaintiff. We affirm in part, reverse in part and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred by failing to grant summary disposition in his favor on the ground that plaintiff's claims were barred by the statute of limitations under MCL 600.5807(8). We agree in part and disagree in part.

As an initial matter, we disagree with plaintiff's argument that defendant's motion for summary disposition failed to specify the grounds on which it was based because it did not state the subrule of MCR 2.116(C) on which it was based in violation of MCR 2.116(C). It is true that the motion did not specify by number the subrule of MCR 2.116(C) on which it was based, but the motion was expressly framed as being based on the statute of limitations. Thus, it was manifest that the motion for summary disposition was in the purview of MCR 2.116(C)(7) which expressly applies to such a motion grounded on a claim being barred by the statute of limitations. In this regard, by specifying that it was based on the statute of limitations, the motion was sufficient to comply with the requirement of MCR 2.116(C) that it "must specify the grounds on which it is based." Contrary to plaintiff's implication, MCR 2.116(C) does not state that a motion for summary disposition must specifically state the number of the subrule of MCR 2.116(C) on which it is based, but only that it must specify which of the grounds provided for by MCR 2.116(C) on which it was based. Thus, defendant's motion for summary disposition was not legally flawed simply because it failed to expressly state by subsection number that it was based on MCR 2.116(C)(7).

Absent a disputed factual issue, we review de novo whether a cause of action is barred by a statute of limitations. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

To begin, the statute of limitations provisions of the Uniform Commercial Code (UCC) are inapplicable to this case. MCL 400.3118(1)-(2) provide a statute of limitations for a "note" payable at a definite time or payable on demand, respectively. To constitute a "note," an instrument must be a "promise." MCL 440.3104(5). MCL 440.3103(1)(i) defines a "promise" as follows:

> "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

It is undisputed that there is no writing in which defendant undertook to repay the loans at issue and, thus, there is no "promise." Hence, the UCC provisions in question are inapplicable. Plaintiff effectively argues that the second sentence of the definition of "promise" in MCL 440.3103(1)(i) provides that a debtor acknowledging a debt and undertaking to pay constitutes a "promise" and that defendant made such a "promise" by making nineteen partial payments on the loan. This argument is contrary to the plain language of the statute. The definition of "promise" provided by the first sentence of MCL 440.3103(1)(i) plainly encompasses only a *written* undertaking to pay money. The second sentence does not purport to alter this definition, but rather merely makes clear that an acknowledgement of an obligation, i.e., a written acknowledgement of an obligation, is insufficient to meet this definition unless it includes an undertaking to pay the obligation. To otherwise construe MCL 400.3103(1)(i) would be contrary to the requirement to apply a statutory definition as expressly defined. See *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 566; 672 NW2d 513 (2003) ("If a statute provides its own definition, the term must be applied as expressly defined").

Under MCL 600.5807(6), there is a six-year limitations period for the breach of contract claims in this case.[1] However, according to plaintiff's complaint, the first loan made in 1990 was to be repaid in monthly installments. MCL 600.5836 provides that "claims on an installment contract accrue as each installment falls due." Thus, the limitations period runs separately for each missed payment under an installment contract from the date that it was due. *HJ Tucker & Associates, Inc v Allied Checker & Engineering Co*, 234 Mich App 550, 562-563; 595 NW2d 176 (1999). Importantly, the nine percent interest rate that plaintiff alleged the parties agreed to for the first loan is illegal because it exceeds the seven percent interest rate limit imposed by Michigan's usury statute, MCL 438.31.[2] Thus, the plain language of MCL 438.32

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[1] Other subsections of MCL 600.5807 provide differing limitations periods for certain specified types of breach of contract actions, but none of those provisions apply to this case. Thus, MCL 600.5807(6), which governs "all other actions to recover damages or sums due for breach of contract," applies to this case.

[2] While MCL 438.31 to MCL 438.31d provide some exceptions and qualifications to this interest rate limitation, none apply to this case.

bars plaintiff from recovering any interest on the first loan because it provides in relevant part that a lender who "charges interest in excess of that allowed by this act is barred from the recovery of any interest." Accordingly, as to the first loan, plaintiff was only legally entitled to recover the principal from defendant. As set forth above, plaintiff alleged in her complaint that the first loan was made in May 1990 for $15,693.18 with monthly repayments to be made (and actually having been made for nineteen months) in the amount of $622. Because plaintiff was barred from recovering interest on this loan, the date that the last monthly payment on that loan was due can be calculated simply by dividing the total amount of the first loan ($15,693.18) by the $622 monthly repayments, which indicates that the last monthly payment was due twenty-six months after the loan was made, i.e., the last payment was due in July 1992. Thus, the six-year statute of limitations ran out as to the last monthly payment in July 1998. Of course, the statute of limitations on the missed monthly payments due prior to July 1992 expired before July 1998. Therefore, because plaintiff's complaint was not filed until 2000, the lower courts erred by failing to hold that plaintiff's claim for repayment of the remaining $3,875.18 principal due on the first loan was barred by the statute of limitations based on the factual allegations of plaintiff's own complaint.[3]

However, the $3,000 and $5,000 loans that plaintiff alleged she made to defendant in 1993 and 1994, respectively, differ from the first loan in that the complaint sets forth no allegations as to the manner or time when these loans were to be repaid. Also, as indicated above, defendant did not file an answer to the complaint. Further, it is undisputed that defendant did not submit documentary evidence in support of his motion for summary disposition based on the statute of limitations. Thus, because of the lack of evidence, it cannot be determined as a factual matter when defendant was obligated to begin repaying the 1993 and 1994 loans. Accordingly, it is simply unclear when the statute of limitations began to run as to those loans. But the burden of establishing that a statute of limitations bars an action is normally on the party asserting this defense. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 74; 577 NW2d 150 (1998). Therefore, we conclude that defendant was not entitled to summary disposition as to plaintiff's claims based on the 1993 and 1994 loans because he failed to present evidence to meet his burden of establishing a statute of limitations defense as to those loans.[4]

Defendant also argues that the district court erred by entering judgment in favor of plaintiff under MCR 2.116(I)(2) where the pleadings did not show that she was entitled to judgment as a matter of law. We disagree. We note that it is unnecessary to consider this issue

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[3] Notably, plaintiff's argument on appeal that the breach of contract did not occur until repayment was requested and defendant refused to pay simply fails to consider that by the allegations of her own complaint the first loan involved an agreement for repayment in monthly installments.

[4] As indicated above, the 1990 loan is distinguishable because it is clear from the allegations of plaintiff's own complaint that the six-year statute of limitations had expired prior to the filing of her complaint as to all payments due under that loan. Thus, there was no need for defendant to present evidence to establish that the statute of limitations had run as to that loan.

as to the loan plaintiff alleged that she made to defendant in 1990 because we have already concluded that her claim as to that loan is barred by the statute of limitations.

However, turning to the loans plaintiff allegedly made to defendant in 1993 and 1994, defendant's argument is premised on plaintiff having failed to present factual support for her claims. But the premise of defendant's argument is flawed because, in light of defendant's failure to file an answer to plaintiff's complaint, she had no obligation to present evidence to factually support her claims. MCR 2.111(E)(1) provides that allegations in a pleading that requires a responsive pleading other than allegations of the amount of damage or nature of relief demanded "are admitted if not denied in the responsive pleading." Defendant did not file an answer or other responsive pleading to plaintiff's complaint. In this regard, defendant's motion for summary disposition does not constitute a responsive pleading under MCR 2.110(A). *Dimondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000). Similarly, while defendant indicates that his answer to plaintiff's request for admissions directly contradicted allegations in the complaint, such a reply to a discovery request cannot be considered a responsive pleading because a reply to a discovery request is not encompassed in the definition of "pleading" provided by MCR 2.110(A) which is expressly limited to certain items. Thus, because defendant never filed a responsive pleading to the complaint, all its allegations must be taken as true regardless of any conflicting factual assertion made in defendant's motion for summary disposition or reply to plaintiff's request for admissions. Accordingly, defendant is not entitled to relief based on this issue.

Notably, in regard to this issue, defendant contends in part that plaintiff was required by MCR 2.113(F) to provide copies of cancelled checks reflecting the 1993 and 1994 loans. However, MCR 2.113(F) merely requires a copy of a written instrument to be attached to a pleading if a claim is "based on a written instrument." As indicated above, it is undisputed that plaintiff's claim is not based on a written loan agreement, but rather on an oral agreement. While copies of the cancelled checks might be some evidence that the loans were actually made, plaintiff's claims are not based on those cancelled checks.

Defendant further indicates that certain factual assertions in plaintiff's brief in opposition to defendant's motion for summary disposition (filed in the district court) were unsupported by the evidence. But this is immaterial because those allegations are unimportant to resolution of the issues raised on appeal.

We affirm in part and reverse in part. We remand this case to the district court for entry of a modified judgment consistent with this opinion. Specifically, plaintiff should recover $8,000 based on defendant's failure to repay the 1993 and 1994 loans, but she cannot recover unpaid amounts from the 1990 loan. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder